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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1597

A. L. MASSEY, ET AL,

Petitioners,

versus

GULF OIL CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The Opinion of the District Court (App. A of the Petition) is not reported. The Opinion of the Court of Appeals for the Fifth Circuit (App. B of the Petition) is reported at 508 F.2d. 92.

JURISDICTION

This action was filed originally in the District Court upon diversity jurisdiction. The other jurisdictional requisites are set forth adequately in the Petition.

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QUESTIONS PRESENTED

We do not agree with the statement of the questions presented as made by the Petitioners. The questions presented are:

1. Did the District Court act within and not abuse the sound discretion vested in it in sustaining Respondent's Motion for a New Trial?

2. Did the Court of Appeals exercise properly its power of review of the ruling of the District Court granting a new trial?

STATEMENT

This action was for damages for the alleged breach of covenants of a Unitization Agreement for the Soso Oil Field located in Smith, Jones, and Jasper Counties, Mississippi. Petitioners were parties to the agreement as owners of a 1/32nd non-participating royalty interest under 122 surface acres in the unitized field, and the Respondent was the unit operator. The first trial resulted in a jury verdict for the Petitioners for $265,876.00. Respondent timely filed a motion for judgment n.o.v., or in the alternative for a new trial. The District Court denied the motion for judgment n.o.v. but granted the new trial. The second trial resulted in a jury verdict for the Respondent. Petitioners thereafter timely appealed to the Court of Appeals. Their only assignment of error was the ruling of the District Court in granting the new trial. No error was assigned as to the second trial. The Fifth Circuit after a full review of the case affirmed the ruling of the District Court and

thereafter denied the Petitioners' request for a rehearing. Petitioners then filed their petition for writ of certiorari here.

ARGUMENT

I.

The District Court Properly Exercised Its Discretionary Power In Granting The New Trial

The District Court based its order for a new trial upon its finding that the damages found by the jury "are so fantastic . . . as to be incredible" and upon the further finding that the "damages awarded in this case are excessive and the verdict is vulnerable to the criticism that its enforcement would be an injustice to defendant (Respondent) under the facts and circumstances in this case . . ." (App. A to Petition, pages 26-27). The District Court further found that: "There is no credible evidence in this record to show that these plaintiffs (Petitioners) have sustained, or will sustain any damages in such an unreasonable amount." (App. A to Petition, page 26).

The authority or power of the District Court to review the evidence and to grant the new trial is stated in Rule 59 (a), F.R.C.P., which in part states:

> "A new trial may be granted to all or any of the parties on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; . . ."

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Petitioners claim that the exercise of this power by the District Court in the case at bar deprives them of the right of trial by jury guaranteed them by the Seventh Amendment of the United States Constitution (Petition, page 7). There is no basis for this contention.

Amendment VII to the Constitution states:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

In 6 A *Moore's Federal Practice*, Section 5905 (2), the statement is made:

> "The power of the English common law trial courts to grant a new trial for a variety of reasons with a view to attainment of justice was well established prior to the establishment of our Government." 6 A *Moore's Federal Practice* at 59-45.

Therefore, the action of the District Court in granting the new trial was "according to the rules of the common law."

At page 20 of the Petition two decisions of this Court are cited by the Petitioners in illustration of the protection afforded by this Court to the constitutional right of trial by jury. One of these cases is *Parsons v.*

Bedford, 3 Pet. 433, 7 L.ed. 732 (1830). The Court discussed Amendment VII, stating:

> "But the other clause of the amendment is still more important, and we read it as a substantial and independent clause. 'No fact tried by a jury shall be otherwise re-examinable in any court of the United States than according to the rules of the common law.' This is a prohibition to the courts of the United States to re-examine any facts tried by a jury in any other manner. *The only modes known to the common law to re-examine such facts are the granting of a new trial by the court where the issue was tried*, . . ." (Emphasis added.) 3 Pet. at 447-8, 7 L.ed. at 737.

The second case cited by Petitioners is *Curtis v. Loether*, 415 U.S. 189, 94 S.Ct. 1005, 39 L.ed. 2d 260 (1974). That decision involved the question of whether a party might demand a jury trial in an action for damages under Title VIII of the Civil Rights Act. The Court decided that jury trials were a matter of right in Title VIII damage actions and then responded to the criticism that trial by jury might deprive a victim of discrimination of the verdict to which he or she was entitled in these words:

> "Of course, the trial judge's power to direct a verdict, to grant judgment notwithstanding the verdict, or *to grant a new trial* provides substantial protection against this risk, . . ." (Emphasis added.) 415 U.S. at 198, 39 L.ed. 2d at 268.

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Both of the decisions cited by Petitioners, as is apparent from these quotations, recognized the power of the trial court to grant a new trial where needed to insure justice. Numerous other authorities could be cited in support of the power of the trial court to grant a new trial and holding that the proper exercise of this power is not an invasion of the jury's function, but the principle is so well established that no further citation is deemed necessary.

We answer the "Questions Presented" as posited by Petitioners as follows:

QUESTION: "1. When can the Court invade the Seventh Amendment province of the jury to try questions of fact?"

ANSWER: Never; but in this case the action of the trial court in granting a new trial was not an invasion of the jury's province. The Court exercised a discretionary power vested in it by law.

QUESTION: "2. Is the amount of oil and gas a prudent operator would recover in a unitized oil and gas field a factual question for the jury and not for the Court to determine?"

ANSWER: All factual issues are determined by the jury, subject however to the duty on the part of the trial judge to see that substantial justice is done through his power to direct a verdict, to grant judgment n.o.v., or to grant a new trial.

QUESTION: "3. Is the weight, thrust and verity of the expert opinion testimony of a

qualified petroleum engineer on the prudence or lack thereof by the operator of an oil and gas field to be decided by the jury instead of the Court?"

ANSWER: The opinion testimony of an expert witness is no better or stronger than the facts upon which it is based. Although the weight to be given his opinion is generally determined by the jury, nevertheless the trial judge may correct any resulting injustice when the record of the trial shows that the premises on which the expert opinion was based were fallacious.

We submit that the District Judge in granting the new trial prudently and properly exercised the discretionary power vested in him to see that justice was done in this case.

II.

The Court Of Appeals Properly Exercised Its Power Of Review Of The Ruling Of The District Court In Granting The New Trial

In the past there has been some question as to the reviewability either by this Court or by a Court of Appeals of an order of a District Court either granting or refusing to grant a new trial. See *Fairmount Glass Works v. Cub Fork Coal Company*, 287 U.S. 474, 53 S.Ct. 252, 77 L.ed. 439 (1933); *United States v. Socony-Vacuum Oil Company*, 310 U.S. 150, 60 S.Ct. 811, 84

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L.ed. 1129 (1940); *United States v. Johnson*, 327 U.S. 106, 66 S.Ct. 464, 90 L.ed. 562 (1946); *Grunenthal v. Long Island Railroad Company*, 393 U.S. 156, 89 S.Ct. 331, 21 L.ed.2d 309 (1968).

That question is not present here. Petitioners sought a review of the District Court's action in granting the new trial. The Opinion written by the Fifth Circuit Court of Appeals illustrates the fact that a full review of the case was made by the appellate court. Petitioners therefore have no standing to complain.

The written Opinion of the Court of Appeals states with precision the fault in the evidence offered by the Petitioners which caused the District Court to grant the new trial. That exposition is more clear than any explanation we might attempt, and we therefore adopt as a part of this Brief the written Opinion of the Court of Appeals (App. B of Petition).

Petitioners' right to trial by jury has been recognized and satisfied fully. Their grievance with the action of the trial court has been reviewed fully.

Petitioners have shown no basis for the granting of a writ of certiorari in this case within the purview of Rule 19 of the rules of this Court. There is no conflict of decisions among the several courts of appeals on any question presented by the petition. The applicable decisions of this Court are in accord with the rulings made by the District Court and by the Circuit Court of Appeals. No important question of federal law is presented here. Neither of the lower courts has departed from the accepted and usual course of judi-

cial proceedings. No need has been shown for this Court to exercise its power of supervision.

CONCLUSION

We respectfully submit that the Petition should be denied.

Respectfully submitted,

_____

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CERTIFICATE

I hereby certify that I have this day served three true and correct copies of the above and foregoing Brief for Respondent In Opposition upon Michael R. Eubanks, Esquire, Post Office Drawer 472, Lumberton, Mississippi 39455, attorney of record for the Petitioners, by placing the same in an envelope addressed to him at said address and placing the same in United States mail, postage prepaid. I further certify that all parties required to be served have been served.

Dated this the ____ day of July, A.D., 1975.

_____

Of Counsel for
Respondent